85-1714

Supreme Court, U.S.
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NO.____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1985

KENNETH PAYNE and MARGARET PAYNE, his wife and the marital community composed thereof,

Appellants,

v.

LARRY MOUNT, Sheriff of Whatcom County, and WHATCOM COUNTY,

Appellees

ON APPEAL FROM THE SUPREME COURT

OF THE

STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Where a civil service statute fails to provide for a pre-termination hearing prior to the dismissal of the civil servant, does the civil servant forfeit his constitutional right to procedural due process by failing to make a timely request for a post-termination hearing as provided for in the same statute?

2. Is RCW 41.14.120 which provides the procedure for removal, suspension or demotion of a classified civil service employee, constitutional where the statute fails to provide for notice and a right to respond prior to an employee's discharge from his employment?

3. Is a classified civil service employee entitled to payment of reasonable

attorney fees incurred in the vindication of his civil rights?

PARTIES

The parties are the same as those contained in the caption.

TABLE OF CONTENTS

Page

A. Opinions Below..... 1

B. Statement of Jurisdictional Grounds..... 1

i. Nature of Proceedings..... 1

ii. Operative Dates..... 1

iii. Statutory Basis of Jurisdiction..... 3

C. Constitutional and Statutory Provisions..... 3

i. Constitutional and Statutory Provisions..... 3

ii. Statutory Provisions..... 4

iii. Rules of Procedure..... 6

D. Statement of the Case..... 7

i. Facts Relating to This Appeal.. 7

ii. Raising the Federal Questions. 8

E. The Questions Are Substantial.....15

F. Conclusion.....18

Appendices.....

Appendix A A-1

Appendix B A-22

TABLES OF AUTHORITY

Table of Cases

Page

Ashley v. Curtis, 408 N.Y.S. 2d 858..... 19

Chamberlain v. Dade County Board, 377 U.S. 402, 84 S. Ct. 1272, 1043 (1964)..... 16

Cleveland Board of Education v. Loudermill, 470 U.S. __, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).....13,15,16,17,18

Gibbons v. Bond D.C., Mo 1981, 523 F. Supp. 843.....19

Laje v. R. E. Thompson General Hospital, 502 F. Supp. 185 (1980).....19

Patsy v. Board of Regents, 457 U.S. 496 (1982).....17,18

Skelly v. State Personnel Board, 15 Cal 3d 194, 124 Cal Rptr. 14, 539 P. 2d. 774.....18-19

Tupper v. Fairview Hospital, 276 Or. 657, 556 P. 2d 1340.....19

United States v. Haley, 358 U.S. 644, 79 S. Ct. 537, E L. Ed. 2d 567 (1959).....16

Constitutional Provisions

U.S. Const., amend V.....1,17

U.S. Const., amend XIV.....1,13,14,17

Statutes

RCW 41.14.120.....4,7,12,15,16

28 U.S.C. Sec. 1257(2).....3

28 U.S.C. Sec. 2103.....3

42 U.S.C. Sec. 1983.....15

42 U.S.C.A. 1988.....19

Rules of Procedure

RAP 2.5(a).....6

Other Authority

Stern and Gressman, Supreme Court Practice (5th Ed. 1978).....3

A

OPINIONS BELOW

The civil complaint of Kenneth Payne and his wife was dismissed by summary judgment entered on the 8th day of October, 1982.

Payne appealed the dismissal by summary judgment to the Court of Appeals of the state of Washington. The Court of Appeals in an unreported opinion dated August 26, 1985, which appears as Appendix "A" hereto affirmed the trial court. The Supreme Court of the state of Washington denied Payne's Petition for Review of the Court of Appeals' decision without opinion on November 8, 1985. See Appendix "B".

B

STATEMENT OF JURISDICTIONAL GROUNDS

i) Nature of Proceedings

This is an appeal from the dismissal, by summary judgment, of Kenneth Payne's complaint seeking reinstatement to his civil service position. Payne alleged, in

part, that the procedures used to terminate him were in violation of the federal Civil Rights Act and Constitution. Payne challenges the constitutionality of the procedures used to dismiss him on the grounds that the failure to provide him with a "pre-termination" hearing offends the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution.

ii) Operative Dates

The decision of the Washington Supreme Court denying review of the Court of Appeals decision was filed November 8, 1985. The decision of the Court of Appeals affirming the trial court's dismissal by summary judgment was filed on the 26th day of August, 1985. Notice of Appeal to this Court was filed with the Washington Supreme Court, the Court of Appeals, Division I, and the trial court on January 31, 1986.

iii) Statutory Basis of Jurisdiction

Jurisdiction of this Court to hear this appeal is premised upon 28 U.S.C. Sec. 1257(2). The appellant requests that this application be considered in the alternative as a petition for certiorari should the Court deem appeal inappropriate. See Stern and Gressman, Supreme Court Practice, (5th Ed. 1978) p. 168; see also, U.S.C. Sect. 2103.

C.

CONSTITUTIONAL AND STATUTORY PROVISIONS

i) Constitutional Provisions

Fifth Amendment to the United States Constitution:

> No person...shall...deprive any person of life, liberty or property, without due process of law..

Fourteenth Amendment to the United States Constitution:

> No State...shall...deprive any person of life, liberty or property, without due process of law..

ii) Statutory Provisions:

RCW 41.14.120:

> No person in the classified civil service who has been permanently appointed or inducted into civil service under provisions of this chapter, shall be removed, suspended or demoted except for cause, and only upon written accusation of the appointing power of any citizen or taxpayer; a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. Any person so removed, suspended or demoted may within ten days from the time of his removal, suspension or demotion, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether the removal, suspension, or demotion was made in good faith for cause. After such investigation, the commission may affirm the removal, or if it finds that removal, suspension, or demotion was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position, or employment from which he was removed, suspended, or demoted, which reinstatement shall, if the commission so

provides, be retroactive, and entitle such person to pay or compensation from time to time of the removal, suspension, or demotion. The commission upon such investigation, in lieu of affirming a removal, may modify the order by directing the suspension without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade or pay. The findings of the commission shall be certified, in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to this section shall be by public hearing, after reasonable notice to the accused of the time and place thereof, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. If order of removal, suspension, or demotion is concurred in by the commission or a majority thereof, the accused may appeal therefrom to the superior court of the county wherein he resides. Such appeal shall be taken by serving the commission, within thirty days after the entry of its order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission of

> all papers on file in the office of the commission affecting or relating to its order, be filed by the commission with the court. The commission shall, within ten days after the filing of this notice, make, certify, and file such transcript with the court. The court shall thereupon proceed to hear and determine the appeal in a summary manner. Such hearing shall be confined to the termination of whether the order of removal, suspension or demotion made by the commission, was or was not made in good faith for cause, and no appeal shall be taken except upon such ground or grounds. The decision of the superior court may be appealed to the supreme court or the Court of Appeals.

iii) Rules of Procedure

Washington Rule of Appellate Procedure 2.5(a):

> The appellate Court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

D.

G. Statement of Case

i) Facts Relating to This Appeal

Kenneth Payne was dismissed from his position as an employee of the Sheriff's Office of Whatcom County, State of Washington, on October 9, 1981. At the time he was a fully tenured civil servant with 12 years of service. He was dismissed in accordance with the procedures authorized by RCW 41.14.120 Removal, suspension, demotion - Procedure - Appeal. On November 2, 1981, Payne appealed his termination to the Whatcom County Civil Service Commission. On November 5, 1981, the civil service commission dismissed his appeal as untimely. RCW 41.14.120 requires that such appeals be made within ten days of removal.

The apparent basis for the discharge, although it was never explicity stated, was

a criminal accusation made by Payne's step-daughter. Subsequent trial on the step-daughter's allegations resulted in Payne's acquittal. Following the acquittal, Payne requested reinstatement to his civil service position. Payne's request was refused.

Payne then filed the present action requesting reinstatement and damages for unlawful discharge. On October 8, 1982, the trial court entered on order granting summary judgment of dismissal on the basis that by failing to appeal to the civil service commission within 10 days of his removal Payne had failed to exhaust his administrative remedies.

ii Raising the Federal Questions.

The federal questions were first raised in Kenneth Payne's complaint on page 1, lines 27 through 32 of the original complaint alleged, "In performing the acts

set forth in the paragraph above, defendants failed to follow and violated Chapter 2.2.Ø of the Whatcom County Sheriff's Manual, violated plaintiff's civil rights and the federal Civil Rights Act and Constitution, deprived plaintiff of equal protection of the law and due process."

Following the filing of the Complaint, the defendants moved for summary judgment. Section 2 of Plaintiff's Memorandum Opposing Defendant's Motion for Summary Judgment of Dismissal is set forth below.

> 2. Have Mr. Payne's Rights Under the Due Process Clause of Fifth and Fourteenth Amendments to the United States Constitution Been Violated?
>
> The holding of the Washington courts as exemplified by Yantsin v. Aberdeen, 54 Wn. 2d 787 is that a civil servant has no property right in continual employment and, therefore, is not entitled to the protection of the Fifth and Fourteenth Amendments. This view is outdated. We believe the better view is that taken by our

sister courts in Skelly v. State Personnel Board, 15 Cal 3d 194, 124 Cal Rptr. 14, 539 P. 2d. 774 and Tupper v. Fairview Hospital, 276 Or [sic] 657, 556 P. 2d. 1340.

These and later cases stand for the proposition that an employee has a property right in his employment if he has the expectancy of continued employment absent misconduct or poor job performance and if such expectancy is justified. Under the civil service laws, Mr. Payne could justifiably expect that his employment would continue absent his misconduct or poor job performance.

Since a property right is acnowledged to exist, the parameters of procedural due process are governed by the Constitution. Procedural due process requires that there be adequate pre-termination safeguards. The Whatcom County Civil Service Rules provide no pre-termination safeguards whatsoever.

The requirements set forth by the Court in Luellen [v. Aberdeen, 20 Wn. 2d 594 (1944)] are common and necessary to the entire fabric of American law. It is even more necessary when dealing with the statutory safeguards afforded civil servants. The question of sufficiency of removal or suspension charges against a civil servant is discussed in McQuillan Municipal Corporations, Third

Edition, Revised Volume 4, Section 122576. McQuillan and the cases cited therein stand for the proposition that accusation must fairly apprise the officer of the grounds or causes for action. "Generic terms like 'incompetency' 'unfitness' and 'the like' state no cause of action", McQuillan, page 382.

The present Civil Service Rules provide only post-termination safeguards. As the Court in Skelly stated:

> It is true that the employee is entitled to a full evidentiary hearing within a reasonable time thereafter, and is compensated for lost wages if the Board determines that the punitive action was improper. However, these post-removal safeguards do nothing to protect the employee who is wrongfully disciplined against the temporary deprivation of property to which he is subjected pending a hearing. Because of this failure to accord the employee any prior procedural protections to 'minimize the risk of error in the initial removal decision' (Arnett v. Kennedy, 416 U.S. 134, 40 L. Ed. 2d 15 94 Sct 1633), we hold that the provisions of the State Civil Service Act, including in particular, Section 19574, governing the taking of

> punitive action against a permanent civil service employee violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of Article I, Sections 7 and 15 of the California Constitution.
>
> At a minimum. Mr. Payne was entitled to notice of the proposed discharge, the reasons therefore, a copy of the charges and materials upon which the action was based and the right to respond prior to a final decision being made.

The trial court granted the defendants' motion and dismissed Payne Complaint.

Payne timely appealed the trial court's dismissal of his complaint to the Court of Appeals, Division I, of the state of Washington. In his brief to the Court of Appeals, Payne urged that he had a property interest in his civil service employment, that he could not be deprived of this property interest without due process of law, that RCW 41.14.120 was unconstitutional in that it did not provide for any pre-termination hearing.

After oral argument, but before the Court of Appeals reached a decision, the Supreme Court of the United States decided Cleveland Board of Education v. Loudermill, 470 U.S. __, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Plaintiff Payne filed a supplemental brief urging that Loudermill, supra, had decided the issues in his appeal. That there no longer was any question that he had a property interest in his civil service employment and that guarantees of due process contained in the Due Process Clause of the Fourteenth Amendment to the Constitution required that Payne be afforded a pre-termination hearing prior to being discharged from his civil service position.

The Court of Appeals affirmed the judgment of the trial court by its decision filed on August 26, 1985. The Court of

Appeals held that Payne's case did not fall within the exception allowing non-compliance with administrative remedies when the applicable statute is claimed to be invalid and ruled "The trial court correctly held that Payne failed to exhaust his administrative remedies on this issue."

Payne timely filed a Petition for Review with the Supreme Court of the State of Washington. In his petition, Payne urged that the Court of Appeals' decision that Payne's failure to exhaust his administrative remedies precluded him from seeking judicial relief was an error. That since the Whatcom County Civil Service Commission could not order a "pre-termination" hearing or otherwise consider Payne's claims that he was denied due process of law under the Fourteenth Amendment, it was unnecessary to exhaust

the administrative procedures of the Civil Service Commission. It was further agreed that 42 U.S. C. 1983 does not require exhaustion of administrative remedies prior to the institution of court action. That Payne had in fact stated a claim under 42. U.S.C. 1983 and should be allowed to proceed to trial.

The Supreme Court of the State of Washington denied the Petition for Review without opinion on November 8, 1985.

E.

THE QUESTIONS ARE SUBSTANTIAL

Both the Court of Appeals and the Washington Supreme Court were urged that RCW 41.14.120 was unconstitutional because it conflicted with this Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. __, 84 L. Ed. 2d. 494, 105 S Ct. 1487 (1985). Neither court addressed this contention.

Appellant believes the holding of Loudermill is directly on point and requires an invalidation of RCW 41.14.120. Accordingly it is appellant's belief that a summary reversal may be appropriate on this issue. See e.g. United States v. Haley, 358 U.S. 644, 79 S. Ct. 537, E L. Ed. 2d 567 (1959); Chamberlain v. Dade County Board, 377 U.S. 402, 84 S. Ct. 1272, 10 L. Ed. 2d 1043 (1964).

In Loudermill, this Court decided that a public employee who can be discharged only for cause must be afforded a pre-termination hearing prior to his discharge. This is precisely the position Payne has taken throughout his case. Instead, the trial court, Court of Appeals and the Washington Supreme Court have refused to recognize Payne's constitutional rights. Rather, they have denied Payne his day in court because he did not

comply with an administrative procedure that since Loudermill, is constitutionally defective on its face.

Payne's complaint alleged violation of "federal Civil Rights Act". This Court in Patsy v. Board of Regents, 457 U.S. 496 (1982) held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to 42 U.S.C. 1983". This is one of the five Federal Civil Rights Acts adopted in the aftermath of the Civil War and is the statute under which Loudermill, supra, was decided. The allegations made by Payne and the arguments urged to the Washington courts state a cause of action under 42 U.S.C. 1983. Yet it is the position of the Washington court's that in order for Payne to assert his rights under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States

Constitution it is first necessary to exhaust any available administrative remedies.

F.

CONCLUSION

Unless the appellee can suggest some reason as to why the rationale of Loudermill, supra, and Patsy, supra, do not apply to this case, it is respectfully submitted that there is no need for plenary consideration and this Court should summarily order that Mr. Payne be reinstated to his former position of deputy sheriff of Whatcom County, be reimbursed for loss of wages since his removal, and that any proceedings to remove Mr. Payne for cause in the future be preceded by a pre-termination hearing. The sister states of California and Oregon now recognize the right of a "pre-termination hearing". Skelly v. State Personnel

Board, 15 Cal 3d 194, 124 Cal Rptr. 14, 539 P 2d. 774 and Tupper v. Fairview Hospital, 276 Or.657, 556 P 2d. 1340.

Kenneth Payne is entitled to payment of reasonable attorney fees incurred in the vindication of his civil rights. 42 USCA 1988. Laje v. R. E. Thompson General Hospital, 502 F. Supp. 185 (1980); Gibbons v. Bond, D.C. Mo 1981, 523 F. Supp. 843. It is now well settled law that 42 USCA 1988 is controling in state court proceedings based upon the deprivation of a federal right. Ashley v. Curtis, 408 N.Y.S. 2d 858.

Respectfully Submitted,

CHAPMAN, FORBES & PACK
By Henry S. Chapman
Attorneys for Appellants

APPENDIX A

FILE

IN CLERKS OFFICE

COURT OF APPEALS

STATE OF WASHINGTON - DIVISION 1

DATE AUGUST 26, 1985

s/CORBET, J.

CHIEF JUDGE

IN THE COURT OF APPEALS OF THE

STATE OF WASHINGTON

KENNETH PAYNE & MARGARET PAYNE, his wife, and the marital community composed thereof,	: NO. 12530-3-I
Appellants,	: DIVISION ONE
v.	:
LARRY MOUNT, Sheriff of Whatcom County, and Whatcom County,	:
Respondents.	:Filed 8/26/85

SCHOLFIELD, A.C.J. -- Kenneth Payne and

his wife appeal the grant of summary judgment to Larry Mount and Whatcom County. Payne contends that the procedures followed in discharging him as a deputy sheriff violated his right to due process under the United States and Washington Constitutions. We affirm.

FACTS

Payne was a tenured deputy sheriff for Whatcom County. Larry Mount, Sheriff of Whatcom County, learned on September 24, 1981 that the Child Protective Services Division of the Department of Social and Health Services was investigating Payne for the possible sexual abuse of his 13-year-old stepdaughter. Mount asked Detective Robert Herring of the Snohomish County Sheriff's Office to investigate.

Herring interviewed Payne's step-daughter on October 1, 1981, and filed a written report with Mount the following

day. This report contained the step-daughter's allegations that Payne had reached inside her clothing and had rubbed her breasts and pubic area on at least one occasion between September 1980 and June 1981. Mount also received a 3 1/2-page written statement from the girl, in which she stated that this sexual contact had occurred on about five occasions.[1]

Herring interviewed Payne on October 2, and that evening Payne allegedly called him and admitted that portions of the allegations were true and offered "to make a deal." Payne acknowledges that the telephone conversation took place, but claims that he denied touching his

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[1] This statement was written by Detective Herring, as told to him by the girl. Although Sheriff Mount stated in his affidavit in support of the motion for summary judgment that he received the statement on October 2, 1981, it is dated October 6, 1981.

stepdaughter's pubic area and admitted only that he touched her breast accidentally.

The stepdaughter was placed in a foster home on October 2, and a dependency petition was filed, citing sexual abuse by Payne, on October 6. On October 7, Payne's attorney[2] called Mount and spoke with him while Payne and his wife were present. A meeting was arranged between Mount and Payne and his wife for that same day. At this meeting, the matter was discussed and Mount allegedly asked Payne to resign.[3]

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[2]Payne's attorney apparently withdrew representation on October 9, 1981. Payne is represented by different counsel in this appeal.

[3]Payne and his wife referred to this meeting in their affidavits, but Mount did not. Payne also asserted in his affidavit that: Sheriff Mount never discussed the six reasons he set forth in the letter of discharge given to me on October 9, 1981."

The next day, Payne's stepdaughter failed to return to her foster home after school. Mount contends that Payne knew where she was, but told the Sheriff's Department that he did not. Payne denies ever knowing her whereabouts.

In a letter dated October 9, 1981, Mount discharged Payne. This letter did not refer to the allegations of sexual abuse specifically; instead, it cited RCW 41.14.110[4] and Whatcom County Civil

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[4]RCW 41.14.110 provides:

"The tenure of every person holding an office, place, position, or employment under the provisions of this chapter shall be only during good behavior, and any such person may be removed or discharged, suspended without pay, demoted, or reduced in rank, or deprived of vacation privileges or other special privileges for any of the following reasons:

"(1) Incompetency, inefficiency, or inattention to, or dereliction of duty;

"(2) Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public, or a fellow employee, or any other act of omission or commission tending to injure the public service; or any other wilful

Service Commission Rule (WCCSCR) IX[5] and listed virtually verbatim the reasons for discharge set forth therein.

(footnote continued)
failure on the part of the employee to properly conduct himself; or any wilful violation of the provisions of this chapter or the rules and regulations to be adopted hereunder;

"(3) Mental or physical unfitness for the position which the employee holds;

"(4) Dishonest, disgraceful, or prejudicial conduct;

"(5) Drunkenness or use of intoxicating liquors, narcotics, or any other habit forming drug, liquid, or preparation to such extent that the use thereof interferes with the efficiency or mental or physical fitness of the employee, or which precludes the employee from properly performing the function and duties of any position under civil service;

"(6) Conviction of a felony, or a misdemeanor involving moral turpitude;

"(7) Any other act or failure to act which in the judgment of the civil service commission is sufficient to show the offender to be an unsuitable and unfit person to be employed in the public service."

[5]Whatcom County Civil Service Commission Rule IX provides, in pertinent part:

"Section 4. Causes Enumerated Any person permanently appointed to the classified service may be removed or discharged, suspended without pay, demoted

Payne sent the Whatcom County Civil Service Commission a letter on November 2, 1981, appealing his termination. The

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(footnote continued)
or reduced in rank or be deprived of vacation privileges or other special privileges for any of the following reasons:

"(1) Incompetency, inefficiency, or inattention to, or dereliction of duty.

"(2) Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public, or a fellow employee, or any other act of ommission [sic] or commission tending to injure the public service; or any other wilful violation of the provisions of this act or the rules and regulations to be adopted hereunder.

"(3) Mental or physical unfitness for the position which the employee holds.

"(4) Dishonest, disgraceful, or prejudicial conduct.

"(5. Drunkness, [sic] or use of intoxicating liquors, narcotics, or any other habit forming drugs, liquid, or preparation to such extent that the use thereof interferes with the efficiency or mental or physical fitness of the employee, or which precludes the employee from properly performing the function and duties of any position under Civil Service.

"(6) Conviction of a felony or misdemeanor involving moral terpitude [sic].

"(7) Carelessness or negligence in use of County property."

(footnote continued)
lieu of affirming a removal, may modify the order by directing the suspension without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay. The findings of the commission shall be certified, in writing to the appointing power, and shall be forthwith enforced by such officer.

"All investigations made by the commission pursuant to this section shall be by public hearing, after reasonable notice to the accused of the time and place thereof, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. If order of removal, suspension, or demotion is concurred in by the commission or a majority thereof, the accused may appeal therefrom to the superior court of the county wherein he resides. Such appeal shall be taken by serving the commission, within thirty days after the entry of its order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to its order, be filed by the commission with the court. The commission shall, within ten days after the filing of the notice, make, certify, and file such transcript with the court. The court shall thereupon proceed to hear and determine the appeal in a summary manner. Such hearing shall be confined to the determination of whether the order of removal, suspension, or demotion made by the commission, was or was not made in good faith for cause, and no appeal shall be

Commission responded 3 days later, denying the request as untimely under RCW 41.14.120[6] and WCCSCR XI, section 2.[7]

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[6]RCW 41.14.120 provided in 1981:

"No person in the classified civil service who has been permanently appointed or inducted into civil service under provisions of this chapter, shall be removed, suspended, or demoted except for cause, and only upon written accusation of the appointing power or any citizen or taxpayer; a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. Any person so removed, suspended or demoted may within ten days from the time of his removal, suspension, or demotion, file with the commission a written demand for an investigation. The investigation shall be confined to the determination of the question of whether the removal, suspension, or demotion was made in good faith for cause. After such investigation, the commission may affirm the removal, or if it finds that removal, suspension, or demotion was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position, or employment from which he was removed, suspended, or demoted, which reinstatement shall, if the commission so provides, be retroactive, and entitle such person to pay or compensation from the time of the removal, suspension, or demotion. The commission upon such investigation, in

Payne was acquitted of indecent liberties in March, 1982. He demanded reinstatement in a letter to Mount, but was refused. On September 8, 1982, he brought suit, alleging his termination had been unlawful and had violated his equal protection and due process rights under state and federal law. He sought damages and reinstatement. Mount and Whatcom County moved for summary judgment, contending primarily that Payne had failed to exhaust his administrative remedies. The trial court granted summary judgment.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Payne contends on appeal that RCW

(footnote continued)
taken except upon such ground or grounds. The decision of the superior court may be appealed to the supreme court or the court of appeals."

[7]Whatcom County Civil Service Commission Rule XI, section 2, contains substantially the same provisions as RCW 41.14.120.

41.14.120 is unconstitutional because it does not provide for a pretermination hearing, that his notice of dismissal was insufficient under due process, and that due process required that he be notified that he had only 10 days within which to appeal. Mount and Whatcom County contend that Payne's failure under RCW 41.14.120 to appeal his dismissal to the Whatcom County Civil Service Commission within 10 days and to appeal to superior court within 30 days of the rejection of his untimely appeal bars judicial review of his claims.

The general rule in Washington is that when an adequate administrative remedy is provided, it must be pursued before the courts will intervene. Orion Corp. v. State, 103 Wn.2d 441, 456, __P.2d __ (1985); Wright v. Woodard, 83 Wn.2d 378, 381, 518 P.2d 718 (1974). Civil Service rules, in general, do provide for an

adequate administrative remedy that must be pursued or review will be barred. See State ex rel. Dunn v. Elliott, 6 Wn. 2d 426, 432-33, 107 P.2d 915 (1940); Pleuss v. Seattle, 8 Wn. App. 133, 136-37, 504 P.2d 1191 (1972).

Payne contends, however, that he was not required to exhaust his administrative remedies in this case because the Whatcom County Civil Service Commission was without authority to determine whether RCW 41.14.120 was unconstitutional based on its failure to provide for a pretermination hearing. See Bare v. Gorton, 84 Wn. 2d 380, 383, 526 P.2d 379 (1974). We do not agree.

Payne did not challenge the constitutionality of RCW 41.14.120 or the Whatcom County Civil Service Commission Rules in his complaint. He did not seek a declaratory judgment. Rather, he merely

alleged that his discharge had been unlawful and that he was entitled to reinstatement and damages.[8] Thus, this case does not fall within the exception allowing noncompliance with administrative remedies when the applicable statute is claimed to be invalid. The issues raised by Payne in the trial court were properly cognizable by the Civil Service Commission. The trial court correctly held that Payne failed to exhaust his administrative remedies on this issue. CLEVELAND BD. OF EDUC. v. LOUDERMILL, 470 U.S. __, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985)

Loudermill was decided March 19, 1985,

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[8]Payne also did not raise a constitutional challenge in his memorandum against the motion for summary judgment. He ignored the exhaustion of administrative remedies issue below and in his opening brief on appeal. He addressed this issue for the first and only time, summarily, in a supplemental brief to this court.

which was after this case was argued in the Court of Appeals. Both parties submitted additional briefs at our suggestion.

Loudermill holds that "'classified civil service employees'" entitled to retain their positions "'during good behavior and efficient service'" and who cannot be dismissed "'except. . . for . . . misfeasance, malfeasance, or nonfeasance in office'" have a property right in continued employment protected by the due process clause of the United States Constitution. Loudermill, 105 S. Ct. at 1491.

Payne's status under RCW 41.14.120 and WCCSCR XI, section 2, gives him a property interest in continued employment protected by the due process clauses of both our federal and state constitutions.[9]

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[9]This conclusion is in accord with Washington Educ. Ass'n v. State, 97 Wn. 2d

Once it is determined that due process applies, the "'question remains what process is due.'" Loudermill, 105 S. Ct. at 1493 (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)). The Court held in Loudermill that due process requires that public employees receive a pretermination "hearing," but that this hearing need not be elaborate. In contrast to a full adversarial evidentiary hearing, all that is required is notice and an opportunity to respond:

> Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are

(footnote continued)
899, 908, 652 P.2d 1347 (1982) and Punton v. Seattle Public Safety Comm'n, 32 Wn. App. 959, 964, 650 P.2d 1138 (1982), review denied, 98 Wn.2d 1014 (1983).

> true and support the proposed action. . .
>
> . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

(Citations omitted.) Loudermill, 105 S. Ct. at 1495.

While we recognize the teaching of Loudermill regarding pretermination hearings, it is now too late for the decision to change the result in this case. Payne has been terminated and failed to pursue his administrative remedies. We perceive no purpose to be served by now remanding for a pretermination hearing where Payne, by failing to pursue his administrative remedies, no longer has the ability to pursue the matter beyond an adverse result from a pretermination hearing. The futility of a pretermination hearing now is particularly obvious here where a request

for reinstatement was denied by Mount following Payne's acquittal of the indecent liberties charge.[10]

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[10]We note also that Payne met and discussed the matter personally with Mount on October 7, 1981. This was prior to his actual termination on October 9 and gave Payne "an opportunity to present his side of the story." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. __, 84 L. Ed. 2d 494, 105 S. Ct. 1487, 1495 (1985). This meeting may well have satisfied the pretermination hearing requirement. Informal conferences have been held sufficient. See Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985) (1-hour conference between employee and supervisor, in which employee notified of the possibility of discharge and given ample opportunity to defend actions and rebut erroneous allegations, satisfies due process); DeSarno v. Department of Commerce, 761 F.2d 657 (Fed. Cir. 1985) (opportunity given to employees to meet with their supervisors, to review their files and discuss their rights and to submit oral and written replies to the charges, satisfies due process); Williams v. Seattle, 607 F. Supp. 714 (W.D. Wash 1985) (demoted police sergeant not entitled to damages for violation of predeprivation rights because letter to the officer fully explained the allegations against him and their source and informed him of the opportunity and obligation to respond).

NOTICE OF TIME LIMIT FOR APPEAL

Payne contends that judicial review of his claim for reinstatement should not be barred because he did not receive notice of the 10-day time limit within which to appeal. Although his notice of discharge did cite RCW 41.14.120, Payne argues that due process required that he be expressly notified of the deadline.

In Washington Educ. Ass'n v. State, 97 Wn. 2d 899, 652 P.2d 1347 (1982), tenured college faculty members challenged the constitutionality of a recently passed Substitute House Bill that established procedures for terminating college faculty members upon a declaration of financial emergency. The bill included the requirement that faculty members being dismissed request a hearing within 10 days. It did not provide for notice of this time limit. The faculty members attacked the

bill on a number of due process grounds, although the lack of notice of the deadline was not specifically challenged. The court upheld the bill's procedures, stating:

> The procedures of SHB 782 are otherwise comprehensive and pass minimum requirements of due process. They provide for notice of the basis for and nature of the dismissal and an opportunity to be heard and they provide for a full adjudicatory hearing.

97 Wn.2d at 910.

We hold that the notice to Payne in this case met the minimum requirements of due process. Although express notification of an appeal period deadline may be the preferred procedure, it is not required, especially when the notice of discharge cites the statute that contains the time limit for appeal.

NOTICE OF DISMISSAL

We shall also consider Payne's claim that his notice of dismissal, which merely

listed the grounds for discharge set forth in RCW 41.14.11Ø and WCCSCR IX, was inadequate. We agree that the notice was very general and did not specify the allegation of sexual misconduct. However, it is clear that Payne knew why he was being dismissed. He has not alleged, and there is no evidence to support the conclusion, that he believed that he was being discharged for any reason other than the alleged sexual abuse of his stepdaughter. There is no evidence that the vagueness of the notice prejudiced him in any way. Furthermore, he never requested that the reasons for his dismissal be clarified. If he had requested a hearing within 1Ø days, he would have been notified more precisely of the basis for his removal. Payne knew the reason for his dismissal and was not damaged by the lack of specificity in the

notice.

Judgment affirmed.

s/Scholfield, ACJ

WE CONCUR:

s/ Coleman, J. s/Ringold, J.

APPENDIX B

THE SUPREME COURT

State of Washington

Olympia

98504-0511

Reginald N. Shriver 753-5080

Clerk Area 206

November 8, 1985

Chapman, Forbes & Pack

Mr. Terry O. Forbes

710 Wall Street Bldg.

Everett, Washington 98201

Honorable David McEachran

Whatcom County Prosecutor

Mr. Eugene R. Moses, Deputy

Whatcom County Courthouse

Bellingham, Washington 98225

RE: Supreme Court No. 52075-5 - Kenneth Payne, et ux. v. Larry Mount and Whatcom

County

Court of Appeals No. 12530-3-I

Counsel:

The above entitled petition for review was considered by the Court on its November 8, 1985, petition for review calendar.

The petition was denied by order number 143/75 filed on November 8, 1985.

Very truly yours,

s/Reginald N. Shriver
REGINALD N. SHRIVER
Supreme Court Clerk

RNS:crf